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Petitioners,

v.

GENERAL ELECTRIC COMPANY and SOUTHERN CALIFORNIA EDISON COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF ON PETITION FOR CERTIORARI

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Petitioners submit this reply to the brief in opposition of Respondents General Electric Company and Southern California Edison Company and the brief of *amici curiae* Baltimore Gas & Electric Company, *et al.*

Respondents and *amici* characterize the Illinois Spent Fuel Act as nothing more than a protectionist measure by which Illinois seeks to isolate itself from the problem of nuclear waste disposal. This characterization admits that nuclear waste disposal is a national problem, but ignores the reality of the lack of a national solution to the problem and the burden the lack of a national solution places upon one state, Illinois, the site of the Morris Facility, the Nation's only commercial away-from-reactor spent nuclear fuel storage facility. The Spent Fuel

Act is not a selfish attempt to protect the resources of the Morris Facility for Illinois residents. Rather, the Act is a preventive measure, designed to ensure that Illinois does not become the dumping ground for the entire Nation's nuclear waste, that the Morris Facility is not abandoned, and that the taxpayers and treasury of Illinois are not forced to bear the burden of abandonment.[1] By invoking unfounded claims of protectionism, respondents and *amici* seek to characterize this case as a "routine" preemption and Commerce Clause case and fail to address the important, recurring issues that require this Court's attention.

I.

THE ARGUMENTS OF PETITIONERS REGARDING PREEMPTION ARE PROPERLY BEFORE THIS COURT

The courts below considered two issues in this case: (1) whether the Atomic Energy Act ("AEA") preempted the Spent Fuel Act; and (2) whether the Spent Fuel Act is unconstitutional under the Commerce Clause. The arguments in the Petition concerning preemption raise the question of the scope of state authority under section 274(k) of the AEA, which expressly grants states the authority to regulate certain aspects of nuclear energy. As the nuclear problem continues to grow throughout the Nation, the question of state authority over nuclear waste and power becomes more and more important to

[1] Respondents and *amici* dismiss abandonment and ultimate state ownership and responsibility as unlikely results of continued use and eventual exhaustion of storage space at the Morris Facility. Yet, as respondents and *amici* are well aware, nuclear waste disposal sites are often abandoned, and states are often required to assume responsibility for abandoned sites. *Amici* concede as much, noting that the State of New York recently assumed responsibility for a disposal and storage site at West Valley that had been abandoned by its private owner. Brief of *Amici* at 6. Private owners have similarly abandoned sites in Sheffield, Illinois and Maxey Flats, Kentucky.

the several states and to the Nation as a whole, and is a question that will recur again and again until resolved by this Court. Under these circumstances, this Court should consider Petitioners' arguments regarding preemption. *See Carlson* v. *Green*, 446 U. S. 14, 17 n. 2 (1980); *Youakim* v. *Miller*, 425 U. S. 231 (1976); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320-21 n. 6 (1971).

The arguments raised by Petitioners concerning preemption are properly before this Court for the additional reason that the failure of the courts below to consider the arguments constitutes plain error warranting notice by this Court. This Court has long recognized the basic principle that a statute is presumed to be valid and constitutional. *Flemming* v. *Nestor*, 363 U. S. 603, 617 (1960); *Cooper* v. *Telfair*, 4 U. S. (Dall.) 14, 18 (1800). Indeed, "[e]very presumption is to be indulged in favor of the validity of [a] statute." *Gitlow* v. *United States*, 268 U. S. 652, 668 (1925). Courts must be particularly "indulgent" in preemption cases in view of this Court's admonition that federal preemption is to be narrowly construed, and, thus, courts may not "seek[ ] out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 446 (1960) (citations omitted).

The Spent Fuel Act must, therefore, be presumed to be valid, especially in the face of a claim that it is preempted. Because of this strong presumption, a court must examine every reasonable ground upon which the Act could be held valid so as to avoid the conclusion that the statute is invalid. *See Porter* v. *Investors Syndicate*, 286 U. S. 461 (1932); *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 311 (1913). Among the reasonable grounds in favor of validity of the Act is Petitioners' argument that the Act is explicitly authorized under Section 274(k). The courts below failed erroneously to consider this argument, an obvious and clear error that this Court should notice. *See Connor* v. *Finch*, 431 U. S. 407, 421 n. 19 (1977); *Washington*

v. *Davis*, 426 U. S. 229, 238 (1976); *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936).[2]

II.

RESPONDENTS AND *AMICI* RELY ERRONEOUSLY ON THE DECISION OF *HODEL* V. *VIRGINIA SURFACE MINING & RECLAMATION ASSOCIATION*, 452 U.S. 264 (1981).

This case is readily distinguishable from this Court's recent decision in *Hodel*. The federal statute at issue in *Hodel* failed to meet the initial requirement necessary to hold a federal statute violative of the Tenth Amendment. That requirement is that the federal statute must directly regulate the "States as States." Because the federal statute at issue in *Hodel* did not require states to take any action and did not prohibit states from taking any action, this Court concluded that the statute did not regulate the "States as States," but only regulated private industry. By contrast, the AEA, as interpreted by the Court of Appeals, "commandeers" Illinois by prohibiting it from taking the steps necessary to protect its treasury and by compelling Illinois to risk, and likely expend, state funds. *See* 452 U. S. at 288. So interpreted, the AEA is regulation of the "States as States" in the most direct and obvious form.[3]

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[2] At a minimum, this Court should vacate the judgment below and remand the case for consideration of Petitioners' argument that Section 274(k) expressly authorizes the Spent Fuel Act. *See, e.g., G. D. Searle & Co.* v. *Cohn*, 102 S. Ct. 1137, 1144 (1982); *Youakim* v. *Miller*, 425 U. S. 231, 236-37 (1976).

[3] The AEA, as interpreted by the Court of Appeals, also satisfies the second and third requirements necessary to hold a federal statute violative of the Tenth Amendment. The ability of a state to control its own treasury is a fundamental "attribute[ ] of state sovereignty," and application of the AEA, as interpreted, would impair the freedom of Illinois to control state expenditures and structure integral operations of its treasury, both of which are traditional governmental functions. 452 U. S. at 287-288.

The decision in *Hodel* is also distinguishable from this case, because the state governmental function at issue there—regulation of land use—is a function exercised under the police power of the state. As this Court recognized in *Hodel*, the law is well-settled that federal legislation that displaces state legislation enacted pursuant to state police power does not violate the Tenth Amendment. The Spent Fuel Act, however, does not involve the exercise of state police power; it is directed toward protection and control of the state treasury, a traditional governmental function essential to establishing and maintaining state sovereignty. The Spent Fuel Act was enacted to prevent Illinois from becoming the dumping ground for the entire Nation's spent fuel and, thus, to reduce the risk of abandonment or other problems at the Morris Facility that might drastically impact the state treasury. The Tenth Amendment prohibits Congress from infringing state sovereignty by imposing restrictions on the freedom of a state to exercise traditional governmental functions, such as protecting and controlling the state treasury. The Tenth Amendment, therefore, compels reversal of the Court of Appeals' interpretation of the AEA.

III.

THE ILLINOIS SPENT FUEL ACT IS A VALID QUARANTINE MEASURE.

Respondents and *amici* argue that the Spent Fuel Act is not a legitimate quarantine measure similar to the statutes upheld in *Asbell* v. *Kansas*, 209 U. S. 251 (1908), and *Clason* v. *Indiana*, 306 U. S. 439 (1939). The starting point for determining whether a statute is a valid quarantine measure is whether the statute prohibits transportation into a state of noxious articles whose "very movement risk[s] contagion and other evils" or articles that "must be disposed of as soon and as close to their point of generation as possible." *City of Philadelphia* v. *New Jersey*, 437 U. S. 617, 629 (1978). The Spent

Fuel Act expressly prohibits transportation of spent fuel into Illinois. Whether the very movement of spent fuel risks contagion or other evils, or whether spent fuel must be disposed of as close to the point of generation as possible, are factual questions raised by Petitioners, but not decided by the courts below. The existence of a controlling issue of fact renders the entry and affirmance of summary judgment by the courts below improper and erroneous. *Phillips* v. *Martin Marietta Corporation*, 400 U. S. 542, 544 (1971); *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256-57 (1948).

Respondents and *amici*, however, assert that summary judgment was appropriate, because, in their view, the Spent Fuel Act is not aimed at prohibiting transportation of spent fuel, but only at preventing storage of spent fuel in Illinois. Respondents and *amici* base this assertion on the ground that the Act permits intrastate shipments of spent fuel, shipments of spent fuel through Illinois, and shipments of spent fuel to Illinois if the state from which the spent fuel is shipped has entered into a reciprocity agreement with Illinois.

Contrary to the assertion of respondents and *amici*, the allowance of intrastate shipments does not invalidate the Act as quarantine measure. The quarantine cases permitted intrastate shipments, recognizing that noxious articles may not always be disposed of at the point of generation because of the lack of disposal facilities or other practical reasons, but should be disposed of as close as possible to the point of generation.

The allowance of interstate shipments through Illinois and interstate shipments under the reciprocity provision is also of no significance when the Act is tested, as it must be, by its practical application. *Near* v. *Minnesota*, 283 U. S. 697, 708 (1931); *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237 (1917). Respondents and *amici* freely admit that the Morris Facility is the only commercial away-from-reactor spent fuel storage facility in the Nation. Therefore, neither interstate commercial shipments through Illinois nor interstate com-

mercial shipments to Illinois under the reciprocity provision will occur. As practically applied, then, the Act prohibits all commercial interstate shipments into Illinois, and is no different from the quarantine measures repeatedly upheld by this Court. Because construction of the Act in light of its practical application renders the Act constitutional under the quarantine cases, the Act must be so construed and upheld as constitutional. *See St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S. 772, 780 (1981); *Porter* v. *Investors Syndicate*, 286 U. S. 461 (1932).[4]

[4] Even if this Court were to accept the argument of respondents and *amici* that the Act is not a valid quarantine measure because the Act permits shipments through Illinois and shipments under the reciprocity provision, the Act may not be stricken in its entirety, but only those parts of the Act referring to through shipments and shipments under the reciprocity provision may be stricken. *See Dorchy* v. *Kansas*, 264 U. S. 286, 289-90 (1924); *El Paso & Northeastern Ry. Co.* v. *Gutierrez*, 215 U. S. 87, 96 (1909); *Berea College* v. *Kentucky*, 211 U. S. 45, 54-56 (1908).

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit for the reasons stated in the Petition for Certiorari.

Respectfully submitted,

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